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No. 04-1131

IN THE
Supreme Court of the United States

Terry L. Whitman,
Petitioner,

v.

U.S. Department of Transportation; Norman Y. Mineta, U.S. Secretary of Transportation
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ALLEN DOTSON IN SUPPORT OF PETITIONER

Brian Wolfman
Public Citizen
Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Amanda Frost
(*Counsel of Record*)
4801 Massachusetts Ave. NW
Washington, D.C. 20016
(202) 274-4046

Counsel for *Amicus Curiae*

September 1, 2005

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Allen Dotson has a direct interest in this case because it concerns an issue very similar to one raised in his pending petition for a writ of certiorari. *See Dotson v. Griesa*, No. 04-1276 (filed March 22, 2005). The second question presented in *Whitman* is whether the Civil Service Reform Act ("CSRA"), 92 Stat. 1111 *et seq.*, precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer, which is identical to the first question presented in Dotson's petition.

Dotson is an African-American who was employed for ten years as a probation officer in the Southern District of New York until his termination in December 1997. Complaint ¶¶ 4, 10-11. He brought an action pursuant to 42 U.S.C. 1981 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against judges and probation officers responsible for his dismissal, seeking damages and equitable remedies for violations of his constitutional right not to be discriminated against on the basis of his race and his right to due process. The district court dismissed his constitutional claims on the ground that the CSRA implicitly precludes federal courts from granting either damages or equitable relief for constitutional injuries, even though the CSRA's remedies

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of the Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation and submission of the brief.

are available only to executive branch employees, and not judicial branch employees such as Dotson.

The Court of Appeals for the Second Circuit affirmed, but recognized that the circuits are split on the availability of equitable relief for constitutional violations and noted that "sound arguments can be mustered both in favor of and against preclusion of a federal employee's equitable challenge to employment discrimination." Dotson Pet. App. 45a.

The only potentially relevant difference between Dotson's and Whitman's cases is that Dotson is an employee of the judicial branch, while Whitman is an employee of the executive branch. Although the CSRA provides some administrative and judicial remedies for executive branch employees, these remedies do not apply to judicial branch employees, who thus have no statutory recourse for violations of their constitutional rights.

Dotson participates as *amicus* here to support petitioner's contention that the CSRA does not preclude a court from granting equitable relief for constitutional violations suffered by *any* employee covered by the CSRA, and also to emphasize that construing the Act to preclude judicial employees such as Dotson from such relief is particularly anomalous – and constitutionally troubling – in light of the CSRA's complete exclusion of judicial branch employees from any of the protections provided other employees. In addition, Dotson notes the possibility that this Court will not reach the second question presented in *Whitman*, and respectfully suggests that this Court grant his petition if it does not resolve that question in *Whitman*.

SUMMARY OF ARGUMENT

I. The judiciary plays a vital role in enforcing constitutional limits on government power by enjoining unconstitutional conduct. This equitable power has long been recognized as more significant, and more essential to the constitutional structure, than the courts' authority to award damages for constitutional violations. Because the CSRA contains no clear statement by Congress purporting to foreclose equitable remedies for constitutional violations, the Act should not be read as displacing courts from their traditional role as guarantors of constitutional limits on government conduct. Moreover, because the CSRA's administrative and judicial remedies apply only to executive branch employees, and not judicial branch employees, it would be particularly troubling to read the Act as foreclosing equitable relief for these employees.

II. If this Court does not reach the question whether the CSRA implicitly precludes courts from awarding equitable relief for constitutional violations in this case, Dotson respectfully requests that this Court grant his petition to resolve a question that has long split the U.S. courts of appeals.

ARGUMENT

I. THE CSRA DOES NOT PRECLUDE FEDERAL COURTS FROM GRANTING EQUITABLE RELIEF FOR CONSTITUTIONAL VIOLATIONS.

A. Courts May Award Equitable Relief For Constitutional Violations Because The CSRA Does Not Explicitly Bar Such Relief.

Courts should not construe statutes to preclude equitable relief for constitutional violations absent a clear statement by Congress that it intended to do so. Moreover, the question whether Congress can deprive individuals of *all* judicial remedies for constitutional violations raises serious constitutional questions. *See Marbury v. Madison*, 5 U.S. (1

Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.") Because the CSRA contains no clear statement precluding an award of equitable relief, the Ninth Circuit erred in reaching this constitutionally troubling result by construing the CSRA to preclude all remedies for constitutional violations. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (construing statute to permit judicial review of constitutional claims and thereby "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

This Court has long recognized a distinction between legal and equitable relief for constitutional claims and has noted the federal courts' established tradition of awarding the latter. *See, e.g., Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Carlson v. Green*, 446 U.S. 14, 42 (1980) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established.") (Rehnquist, J., dissenting); *Ex parte Young*, 209 U.S. 123 (1908); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824); *see also* Elizabeth A. Wells, Note, "Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?" 90 Mich. L. Rev. 2612, 2645 (1992) (equitable remedies should be allowed under the CSRA); Gene R. Nichols, "*Bivens*, *Chilicky*, and Constitutional Damages Claims," 75 Va. L. Rev. 1117 (1989) (noting that the Court has drawn a distinction between legal and equitable relief for constitutional violations).

For this reason, two circuits have held that equitable relief is available for employees who are suffering an ongoing

constitutional violation. In *Hubbard v. EPA*, 809 F.2d 1 (D.C. Cir. 1986), the D.C. Circuit declared that although the CSRA precluded a covered employee from pursuing a *Bivens* action for money damages, it did not bar his claim for injunctive relief. The court explained:

> The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and, as *Carlson v. Green*[, 446 U.S. 14 (1990),] made clear, comparatively easy for Congress to preempt. The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)). Although Congress may limit this power, *see Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), CSRA did not explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies.

809 F.2d at 11 n.15, *reaff'd in relevant part en banc*, *Spagnola v. Mathis*, 859 F.2d 223, 230 (D.C. Cir. 1988) ("[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights.")

The Third Circuit joined the D.C. Circuit in *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995). *Mitchum* concerned employees who sued the Veterans Administration Medical Center ("VAMC") claiming that the VAMC administrators had violated their First Amendment rights by retaliating against them for statements they made about patient care. The employees sought injunctive and declaratory relief. The VAMC responded that their claims were preempted by the CSRA, citing *Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush*, this Court had rejected a federal employee's *Bivens* action for *damages* on the ground that the "comprehensive procedural and

substantive provisions" of the CSRA are "special factors counselling hesitation in the absence of affirmative action by Congress." *Mitchum*, 73 F.3d at 31, 34 (citing *Bush*, 462 U.S. at 368, 377).

The Third Circuit rejected the VAMC's argument that *Bush*'s refusal to permit damages awards precluded courts from awarding injunctive relief as well. The Third Circuit began by observing that federal courts have long had the power to grant equitable relief for constitutional violations. *Mitchum*, 73 F.3d at 35 (citing *Osborn*, 22 U.S. at 838-46, 859 and *Ex parte Young*, 209 U.S. 123). The Third Circuit stated that, although Congress could choose *explicitly* to restrict the availability of injunctive relief, courts "should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* Accordingly, the Third Circuit held that the VAMC employees could pursue their claims for equitable relief for violation of their constitutional rights.

The First, Second, Ninth, and Tenth Circuits have concluded that the CSRA bars the award of equitable relief because they misread this Court's precedents in *Bush*, 462 U.S. 367 and *Fausto v. United States*, 484 U.S. 439 (1988). Respondents mistakenly rely on these cases in their Brief in Opposition to argue that equitable relief is barred by the CSRA. Whitman Brief in Oppostion at 14-16. *Fausto* is particularly inapposite because it concerned only the question whether the CSRA prohibits statutory relief under the Back Pay Act, and not whether the CSRA bars remedies for deprivations of constitutional rights. *See* 484 U.S. at 455 (Blackman, J, *concurring*) (noting that the case did not raise the question whether courts could grant equitable relief for a constitutional violation). Thus, *Fausto* has no bearing on the question

whether the CSRA implicitly bars courts from awarding equitable relief for constitutional violations.

In *Bush*, this Court held that the CSRA precludes constitutional claims for damages because Congress's provision of comprehensive remedies under the CSRA suggests that Congress did not want courts to award alternative legal remedies. That decision does not support the conclusion that the CSRA prohibits the award of equitable relief as well, however, because it addressed only the availability of legal, and not equitable, remedies. As discussed above, the longstanding distinction between the two types of remedies, and the need to have some safety valve to protect citizens from violation of their constitutional rights, requires that the CSRA be construed to allow courts to award equitable relief for constitutional violations.

B. Because The CSRA's Remedial Provisions Apply Only To Executive Branch Employees, The CSRA Does Not Impliedly Preclude Courts From Awarding Equitable Relief To Judicial Branch Employees.

The Second Circuit's denial of equitable relief in *Dotson* is even more troubling than the Ninth Circuit's decision in *Whitman* because it involved a judicial employee who is not covered by *any* of the administrative and judicial remedies Congress provided to executive branch employees under the CSRA. Because Congress legislated specific remedies *only* for executive branch employees, those statutory remedies do not impliedly prohibit courts from awarding equitable relief for constitutional violations suffered by judicial employees. Furthermore, recourse to the judicial system is even more of a constitutional imperative for judicial employees than for the executive branch employees – who are statutorily-guaranteed at least some protections of their constitutional rights.

1. The CSRA's Administrative And Judicial Remedies Do Not Apply To Judicial Branch Employees.

The CSRA divides civil service personnel into three main categories: the senior executive service, the competitive service, and the excepted service. Dotson Pet. App. in No. 04-1276, at 10a-11a. Employees of the judicial branch, including probation officers such as Dotson, are excepted service personnel. *Id.* 11a (citing 5 U.S.C. 2103(a)).

Chapters 23, 43, and 75 of the CSRA "afford detailed procedural protections to civil service employees who experience adverse employment actions." Dotson Pet. App. 11a. None of those chapters applies to judicial employees such as Dotson, however. *Id.* 11a-15a.

Chapter 23 forbids an agency from engaging in certain "prohibited personnel practices," including unlawful discrimination based on race. 5 U.S.C. 2302(b). In addition, it preserves federal employees' rights to bring an action in district court under Title VII for racial discrimination. 5 U.S.C. 2302(d). Excepted service personnel are generally covered by Chapter 23. Because Chapter 23's protections apply only to "'employee[s] in, or applicant[s] for, a covered position in an *agency*,'" however, it does not cover Dotson, who works for the judiciary, not an agency. Dotson Pet. App. 12a (citing 5 U.S.C. 2302(a)(2)(A)) (emphasis in original).

Chapter 43 "'governs personnel actions based on unacceptable job performance.'" Dotson Pet. App. 13a (quoting *Fausto*, 484 U.S. at 445). Section 4301(2) defines "employee" as an "individual employed in or under an agency," and section 4301(1) defines an "agency" as an "executive agency." Pet. App. 13a. Accordingly, Chapter 43 also does not apply to a judicial employee such as Dotson.

Chapter 75 provides procedural protections for employees who face adverse personnel action for behavior that will

interfere with the "efficiency of the service" (such as discourteous or disruptive behavior). Dotson Pet. App. 13a (quoting *Fausto*, 484 U.S. at 445). Again, judicial employees like Dotson do not qualify for Chapter 75's protections because that Chapter does not apply to probation officers. *Id.* 15a.

In reviewing Dotson's remedies under the CSRA, the Second Circuit concluded:

> In sum, while the CSRA meticulously categorizes the thousands of federal civil service employees into three categories and provides a detailed and comprehensive means for addressing their employment grievances, it provides no administrative or judicial review rights for non-preference eligible excepted service personnel serving in the judicial branch such as Dotson.

Dotson Pet. App. 15a.

2. Equitable Remedies Must Be Provided To Judicial Employees, Who Are Otherwise At Risk Of Being Left Without Any Remedy For Constitutional Violations.

The fact that statutory protections available to executive branch employees do not apply to judicial employees makes it more difficult to read the CSRA to impliedly prohibit equitable relief for these employees, as well as more constitutionally troubling to do so. Yet, according to the Second Circuit, Congress's failure to provide remedies for judicial employees under the CSRA meant that Congress intended to exclude these employees even from the judiciary's longstanding authority to correct constitutional violations through injunctive relief. That conclusion cannot be squared with this Court's stated reluctance to find that Congress has intentionally deprived individuals of any remedy for constitutional harms. *See, e.g., Webster*, 486 U.S. at 603.

In their opposition to Dotson's petition, the respondents argued that no such constitutional problems arise from this construction of the statute because the judicial branch has voluntarily adopted administrative remedies – a Model EEO Plan – that provide for the equitable relief (reinstatement) that Dotson sought. Dotson Brief in Opposition 15-16. The Model EEO Plan provides for hearings by a designated judicial officer who has "broad discretion to provide 'such discovery and investigation as is necessary.'" Dotson Pet. App 35a-36a. The employee has the right to be represented by counsel, present evidence, and cross examine witnesses at these hearings. *Id.* 36a. The judicial officer has the power to award relief, and there is the opportunity for appellate review before the judicial council of the circuit. *Id.* Respondents claim that the plan provides for a "judicial forum" and ensures that employees have "'one or more levels of judicial review'" Dotson Brief in Opposition 17 (quoting Dotson Pet. App. 48a).

As a threshold matter, the Model EEO Plan is entirely voluntary and is the creation of the judicial branch, not Congress; thus, its existence cannot be read as a reflection of *Congress's* intent to preclude an award of equitable relief from an Article III judge. *See Duffy v. Wolle*, 123 F.3d 1026, 1034-35 (8th Cir. 1997) (rejecting the argument that the judiciary's EEO Plan precluded *Bivens* remedies and holding that "*[o]nly Congress* has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action") (emphasis in original).

In any case, the review procedures available under the Model EEO Plan are not equivalent to presenting ones' case to an Article III judge acting in a judicial capacity. Judges review employee complaints under the EEO Plan in their role as supervisors of the probation office, not as Article III judges. *Cf. Forrester v. White*, 484 U.S. 219, 229-30 (1988) (in deciding to discharge probation officer, judge engages in

"administrative," not "judicial," act and thus is not entitled to absolute immunity); *Duffy*, 123 F.3d at 1034 (same). As this Court explained in *Forrester*, "a judge who hires or fires a probation officer cannot meaningfully be distinguished from . . . any [] Executive Branch official who is responsible for making such employment decision." *Id.* at 229. Moreover, the hearing in Dotson's case was before employees in, and judges who supervise, the very Probation Office that fired him – the epitome of a "hollow" remedy. *Krueger v. Lyng*, 927 F.2d 1050, 1056 (8th Cir. 1991) ("We note that the remedy made available to Krueger . . . is very limited, and indeed may even be characterized as 'hollow,' as the extent of his remedy is limited to appealing to the supervisor of those who fired him.").

Accordingly, respondents, like the Second Circuit, erred when contending that "[b]y suing in federal court, petitioner seeks only to have 'his claim reviewed by a different set of judicial officers' than those afforded to him by the courts' long-established administrative scheme." Dotson Brief in Opposition 17 (quoting Dotson Pet. App. 48a). Judicial branch employees whose constitutional rights have been violated seek review by an Article III judge *acting in his capacity as judge*, not in his capacity as supervisor of the probation office. Because Congress has not impliedly precluded such relief, and because the Model EEO Plan does not offer it, there is no basis for this Court to conclude that the CSRA precludes courts from awarding equitable relief to judicial branch employees.

II. IF THIS COURT DOES NOT REACH THE SECOND QUESTION PRESENTED IN *WHITMAN*, IT SHOULD GRANT DOTSON'S PETITION TO RESOLVE THAT QUESTION.

The first question presented in Whitman's petition concerns the Ninth Circuit's holding that 5 U.S.C. 7121(a)(1) *expressly* precludes judicial review when an employee's claim falls within matters subject to grievance procedures established

under a collective bargaining agreement. Petitioner Whitman argues, to the contrary, that Section 7121(a)(1) clearly gives federal courts jurisdiction to hear his claims – a conclusion supported by the Eleventh and Federal Circuits. *See* Whitman Petition at 12 ("On its face, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts; to the contrary, it leads to the inescapable conclusion that such recourse *is* available."); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002); *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Commission*, 329 F.3d 1235 (11th Cir. 2003).

If this Court were to conclude *either* that 5 U.S.C. 7121(a)(1) expressly precludes judicial review *or* that it clearly provides for such review, then it will not reach the second question in this case and the question raised in Dotson's petition, namely, whether the CSRA as a whole *implicitly* precludes federal employees from bringing a claim for injunctive relief for constitutional violations. In *Dotson*, the Second Circuit did not find that any provision in the CSRA expressly precluded judicial review. It held instead that "because the CSRA reflects a detailed and comprehensive system for dealing with federal employment concerns, federal courts will generally not attempt to supplement the relief afforded by that statute through other actions, including those implied under *Bivens* or derived from equity." Dotson Pet. App. 4a. Nor did the D.C. and Third Circuits' decisions holding that injunctive remedies are available for constitutional violations maintain that any statutory provision expressly allowed for judicial relief. Rather, those courts concluded that injunctive relief for constitutional violations was presumptively available when no other remedy was provided and Congress had not expressly precluded such relief. *See, e.g., Hubbard*, 809 F.2d at 11 n.15 (observing that the CSRA does not

"explicitly" preclude equitable relief for constitutional violations).

Thus, the question whether the CSRA impliedly precludes courts from awarding equitable relief might remain unresolved even after this Court issues its decision in this case. If that occurs, Dotson respectfully requests that this Court grant his petition to resolve this question that has long divided the circuit courts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

Amanda Frost
(*Counsel of Record*)
4801 Massachusetts Ave., NW
Washington, D.C. 20016
(202) 274-4046

Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae

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